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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 71

FEDERAL POWER COMMISSION, PETITIONER

v.

SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinions of the Court of Appeals for the Ninth Circuit (R. 938–954) are reported at 310 F. 2d 784. The opinion and orders of the Federal Power Commission (R. 839–869, 892–897) are reported at 26 F.P.C. 223 and 492.

JURISDICTION

The decree of the Court of Appeals setting aside the Commission order was filed on November 16, 1962 (R. 955). The petition for a writ of certiorari was filed on February 8, 1963, and granted on April 1, 1963, 372 U.S. 958. The jurisdiction of this Court

rests upon 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the Commission's exercise of its authority under 201(b) of the Federal Power Act to regulate "sale[s] of electric energy at wholesale in interstate commerce" depends in each case upon a determination of whether there is a "national interest" in the sale arising from a conflict of state interests.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 791–825r, are set out in the Appendix, *infra*, pp. 43–48. Corresponding provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, are also set forth, *infra*, pp. 48–52.

STATEMENT

The decision below sets aside a Federal Power Commission order holding (a) that sales of electric energy at wholesale by Southern California Edison Company ("Edison") to the City of Colton, California ("Colton"), were subject to the Commission's jurisdiction under Section 201(b) of the Federal Power Act; and (b) that increased rates for those sales which Edison had put into effect were unlawful because they had not been filed with the Commission.

The administrative proceeding in which the Commission's order was entered was initiated by Colton on May 9, 1958. Although Edison had obtained purported authorization for the rate increases from the California Public Utilities Commission, Colton

claimed that in substantial part the energy came from out-of-state sources, and that the rates were thus subject to the authority of the Federal Power Commission rather than the California Commission. Hence, it asserted, Edison's failure to file the increases with the Power Commission rendered its collection of those increases unlawful and subject to refund.

The evidence, as developed at a hearing before the Federal Power Commission, showed that Colton, a city of some 18,000 persons located near San Bernardino, California, purchased the entire electric energy requirements of its municipally owned electric utility system from Edison under a contract dated October 1, 1945 (R. 924). During the calendar years 1954 through 1958, Colton served an average of 5,400 to 6,025 retail customers (R. 843).

Edison, which is admittedly a "public utility" within the meaning of Section 201(e) of the Power Act,[1] markets electric energy in central and southern California. It owns and operates a number of steam and hydro-electric generating stations in California and has also obtained energy from the federally owned Hoover, Davis and Parker water power projects on the Colorado River. The energy at Hoover and Davis is generated either in Nevada or Arizona (R. 840–841).

The Hoover, Davis, and Parker projects are interconnected by a 220 kilovolt (kv) transmission line,

[1] Edison owns interstate transmission facilities, including high voltage lines from Hoover, in Nevada, to the Chino substation in California, which makes it a regulated "public utility" under the Power Act (R. 183, 841).

and both Edison and the Metropolitan Water District of Southern California ("Water District") are connected with this 220 kv system. Water District lines from Hoover and Parker interconnect at Water District's Camino switching station in California and extend to a connection with Edison's 220 kv line at Hayfield, in California. From Hayfield, Edison's 220 kv line extends about 105 miles in a westerly direction to its Highgrove substation. From there, delivery of power is made to the City of Colton. In addition, Edison itself owns and operates two 220 kv lines from the Hoover project, in Nevada, to Edison's Chino substation in California, which are connected with the Highgrove substation fifteen miles away (R. 841).[2]

The Commission accordingly found there were three routes by which out-of-state energy could reach Colton: (1) from Hoover over the Water District line to the Camino switching station, to the interconnection with Edison at Hayfield, to the Highgrove substation, and thence to Colton through two substations; (2) from Hoover to Davis, to Parker, to the Camino switching station, to Hayfield, to Highgrove and thence, as before, to Colton;[3] and (3) from Hoover over Edison's own 220 kv lines to Chino, to Highgrove and on to Colton.

The electrical engineering witness of the Commission's staff presented evidence relating to use of the

[2] In its rehearing petition to the Commission, Edison alleged that since January 7, 1961, subsequent to the close of the hearings, the Highgrove substation has been disconnected from the Chino substation (R. 884).

[3] These two routes are mapped on Exhibit 1 (R. 715).

first two of these routes during the period from July 1, 1954, to November 30, 1958 (R. 841–842). Energy coming into Highgrove on the 220 kv line from Hoover (and at times from Davis) through the Hayfield substation is stepped down in voltage through two transformer banks and transmitted through two 66 kv circuits extending about 1.8 miles to Edison's "Colton" substation, located in the City of Colton. Thence, through further transformers and related equipment, the energy is fed to the so-called Globe Mills and Derby 11 kv circuits,[4] which together form a loop to Edison's "Colton City" substation about a mile away. At that point, voltage is again reduced and delivery is made to Colton at 4 kv for resale to residential, commercial, and other customers in and around Colton. Energy which is not for resale is also delivered from the Colton substation to the City of Colton via three other 11 kv lines for well-pumping at four separate sites (R. 587–588, 842).

The Commission further found that out-of-state energy from both Hoover and Davis Dams was included in Edison's sales at wholesale to the City of Colton during the period 1954–1958, and that those sales were in interstate commerce (R. 851–854). The out-of-state energy delivered over the Water District's lines was paid for pursuant to a 1945 contract among numerous parties, including the United States, Edison, and the Water District. Under that contract Edison agreed to take a portion of the unused firm energy allocated to the Water

[4] The record shows that in the future, deliveries will be made at 12 kv from a new substation.

District at specified rates to be paid to the United States for the credit of the Water District. (R. 939.)

The Commission held that Part II of the Power Act gave it jurisdiction over all sales at wholesale in interstate commerce without requiring a determination in each case as to whether the interests of more than one State are involved (R. 848–850). It did find, however, that in any event the interests of Arizona and Nevada, as well as California, are affected by the interstate sale at wholesale to Colton (R. 850–851).[6] In addition, it rejected contentions that Section 6 of the Boulder Canyon Project Act, 45 Stat. 1056, 1061, as amended, 43 U.S.C. 617e, divested the Commission of jurisdiction over sales at wholesale by Edison to Colton; that the exemption of local distribution facilities in Section 201(b) of the Power Act precluded jurisdiction over these sales; and that it should decline to exercise rate jurisdiction on the ground that the matter was *de minimis* (R. 844–847, 854–856, 863–864).

Having concluded that Edison's sales at wholesale to Colton were within its jurisdiction, the Commission ordered Edison to file the 1945 contract, under which those sales were being made as the continuing

[6] Specifically, it found that the operation of the Hoover Power Plant is integrated with the operation of other projects on the Colorado River and with the systems of the operating agents which provide service for all three States and that the way in which the Colorado River plants are integrated and the amount of energy taken by any of the allottees of energy in any of the States at any one time is of interest to the other allottees, including the States of Nevada and Arizona.

effective rate schedule and to cease and desist from charging, demanding, or receiving from Colton any rates and charges in excess of the rate originally fixed in that contract unless and until such rate should be lawfully changed in accordance with the procedure set forth in Section 205(d) of the Power Act. It also required Edison to account for those sums collected from Colton on and after July 1, 1954,[6] which were in excess of the amounts that would have been collected under the rate fixed in the contract; to establish a special reserve account for that excess together with interest; and to file with the Commission its computations and accounting entries together with a proposed plan for the disposition of the special reserve (R. 856–860, 862–863, 867–868).[7]

Petitions for rehearing (R. 870–891), challenging these conclusions, were denied by the Commission on September 14, 1961 (R. 892–897).

The court below (Circuit Judge Browning dissenting) set aside the Commission's order on the ground that the Commission has no authority under Section 201(b) of the Power Act to regulate Edison's sale at wholesale to the City of Colton. Although it assumed the correctness of the Commission's finding that the

[6] This was the earliest date on which federal jurisdiction was determined.

[7] Edison made the filings required by the order under review and then, on December 1, 1961, it tendered for filing pursuant to Section 205 of the Power Act, 16 U.S.C. 824d, a new rate schedule increasing its rate for sales at wholesale to the City of Colton above the level it had previously been collecting. After a five-month period of suspension, the new rates became effective on June 1, 1962, subject to refund contingent upon the outcome of the rate proceeding initiated by the Commission.

sale was in interstate commerce and that the Boulder Canyon Project Act did not oust the Commission of jurisdiction, the majority concluded that federal jurisdiction under the Power Act depends in each case upon the existence of a multistate concern in the particular sale and that only California had an interest in the sales by Edison to Colton because "the original sale for interstate transmission is under federal control and no other state is affected in any way by regulation of the subsequent transaction" (R. 951).

SUMMARY OF ARGUMENT

I

A. Section 201(b) of the Federal Power Act provides that Parts II and III of that Act "shall apply * * * to the sale of electric energy at wholesale in interstate commerce." Notwithstanding this unqualified grant of jurisdiction, the court below held that the sale at wholesale by Edison to Colton, which it assumed to be "in interstate commerce," was not subject to the authority of the Federal Power Commission because the prior sale to Edison was under federal control and "no other state is affected in any way by regulation of the subsequent transaction" (R. 951). The court reasoned that the policy declaration in Section 201(a) of the Act limits federal jurisdiction to those matters which this Court would have held, prior to the enactment of Part II in 1935, to be beyond the regulatory power of the States, and that, under the pre-1935 decisions of this Court, the trans-

action involved in this case would have been within the States' constitutional reach.

It is far too late, however, to define the Commission's jurisdiction over sales at wholesale in interstate commerce on the basis of a restrictive reading of this Court's decisions in *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83, and related cases. For although the primary purpose of Congress in giving the Commission jurisdiction over the sale of interstate power at wholesale was to close the "*Attleboro* gap," Congress was not content merely to proclaim that objective in general terms and then leave the determination of the limits of the States' constitutional authority to the vagaries of time and the fortuities of litigation. Instead, Congress itself explicitly defined the scope of the regulatory "gap" it wished to bridge, making the legislative judgment that all sales at wholesale should be regulated by the federal commission.

B. The legislative history of Part II of the Federal Power Act fully confirms this. It shows that in legislating to fill the "*Attleboro* gap" Congress treated all interstate sales at wholesale of electric energy as beyond the control of the States under the prior decisions of this Court.

C. This Court, in repeated holdings, has made it abundantly clear that the Federal Power Commission has plenary jurisdiction over all sales at wholesale of both electric energy and natural gas in interstate commerce. *E.g., Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506–508; *Colorado-Wyoming Gas Co.* v. *Federal Power Com-*

mission, 324 U.S. 626, 629–631; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 418. In the Court's view, "Congress interpreted [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power." *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 308. "The line of the statute was * * * clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise." *Panhandle Eastern Pipeline Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 517. The suggestion that these repeated rulings are mere dicta, inapplicable to situations where the first interstate sale is subject to federal control, has no foundation.

D. The general declaration of policy contained in Section 201(a) was not designed to serve as an independently operative savings clause restricting the jurisdiction conferred by other provisions, but was intended merely to state in broad terms the basic aims to be implemented by specific limitations inscribed elsewhere in the Act. This is plainly apparent from the legislative history.

II

A. The test adopted by the decision below would prove vexing and burdensome in application, would inevitably inspire protracted litigation and varying

judicial interpretations, and would operate to the detriment of effective regulation. Under that test, it would become necessary in every case to determine whether another State "is affected in any way by regulation of the subsequent transaction." If this were a Sherman Act case, no court would deny that a continuous stream of energy (or of goods) moving from an out-of-state supplier to an in-state wholesaler and thence to an in-state distributor would be a matter of interstate concern; the courts would presume that, no matter how local the squeeze, interstate commerce would feel the pinch. *United States* v. *Women's Sportswear Association*, 336 U.S. 460, 464. Under Section 201(b) of the Power Act, there is even less reason for requiring a full evidentiary showing as to how or in what degree interstate interests are affected. The mere fact that a designated transaction is "in interstate commerce" satisfies the statutory language.

B. Certainly, there is no basis for assuming that a wholesale transaction in interstate commerce, because it takes place entirely within a single State, is not a subject of federal concern. If the in-state seller also makes sales of electric power to customers in other States, an excessive rate for the in-state sale may contract the demand for the seller's power among in-state distributors and hence increase the proportion of the seller's system-wide fixed costs which must be borne by the out-of-state customers. On the other hand, an exceedingly low in-state rate may require the seller either to recover a dispropor-

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tionate share of its costs from its out-of-state customers or to operate on an unprofitable basis, with adverse effect upon the quality and efficiency of its service. And even where the seller has no out-of-state customers, an increase in its rate may tend to reduce the amount of power it imports from an out-of-state supplier and thereby increase the unit costs which the latter must pass on to its own customers in other States. It is evident from these illustrations that the application of the standard prescribed by the decision below would present factual and legal questions of great complexity—questions which Congress wisely by-passed by establishing a clear and workable boundary line as between federal and state jurisdiction.

C. Respondent Edison argues that the difficulties of proving that another State is affected may be avoided by reading into the decision below a simple rule, *i.e.*, that "once there has been a federally-regulated sale for resale of energy which is to be consumed wholly within one state, subsequent sales of that energy within the state of ultimate consumption involve the interest only of that state." This simplicity would be achieved only at the expense of effective regulation.

1. Edison's rule would deprive the Commission of jurisdiction over in-state wholesale sales even in cases where the company making the sale is a member of an interstate power pool—an integrated network of power sources which have tied their facilities together by high-voltage transmission lines reaching across state borders and arranged to coordinate their plan-

ning and operations in an effort to bring about major economies of scale. In such cases, the need for federal regulation is vital. For in order to determine the legitimate costs of any member of the pool, and thus the just and reasonable rate for the power sold by that company to wholesale customers in its own and other States, a regulatory agency must have a highly specialized staff and, even more indispensable, the legal authority to compel production of the books and records of all members of the system, not merely the member whose rates are at issue. It is clear that state commissions lack this essential legal authority and cannot effectively deal with this class of sales.

2. Edison's approach would also impair the Power Commission's authority, under Section 202(b) of the Act, to order members of a pool (or, indeed, any other wholesaler of interstate power) to make interconnections with local distribution companies—a matter of fundamental importance to the achievement of national objectives envisioned by Congress.

3. Edison can draw no comfort from the fact that in 1954 Congress amended the jurisdictional provisions of the Natural Gas Act along the lines which Edison would adopt (by way of interpretation) for the Power Act. Congress has not seen fit to amend the latter statute in a comparable manner; indeed, a bill which would have had this effect was vigorously opposed by the Commission at protracted hearings during the 80th Congress and died in committee. Moreover, Edison's proposal would not contain the qualifications upon which Congress insisted when it granted a limited exemption for gas pipelines.

ARGUMENT

THE TERMS OF SECTION 201(b), CONFIRMED BOTH BY ITS LEGISLATIVE HISTORY AND A LONG, UNBROKEN LINE OF DECISIONS IN THIS COURT, ESTABLISH THAT THE FEDERAL POWER COMMISSION HAS JURISDICTION OVER ALL SALES AT WHOLESALE OF ELECTRIC ENERGY IN INTERSTATE COMMERCE.

A. THE GRANT OF JURISDICTION OVER SALES AT WHOLESALE IN INTERSTATE COMMERCE IS PLENARY AND UNQUALIFIED

Section 201(b) of the Federal Power Act provides that Parts II and III of the that Act "shall apply * * * to the sale of electric energy at wholesale in interstate commerce."* In holding that the Federal Power Commission's jurisdiction over wholesale transactions in interstate commerce nonetheless depends upon a specific case-by-case showing of multi-state interest in the sale, the court below declined to give effect to this express statutory grant of jurisdiction. Instead, it based its ruling on the declaration in Section 201(a) of the Act that federal regulation was "to extend only to those matters which are not subject to regulation by the States."* The court reasoned that the policy declaration limits federal jurisdiction to those matters which this Court would have held, prior to the enactment of Part II in 1935, to be beyond the regulatory power of the States. And it in-

*Section 201(d) of the Act defines "sale of electric energy at wholesale" as "sale of electric energy to any person for resale." In this connection, see *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 312–316.

*We point out *infra*, pp. 27–30, that Section 201(a) is not to be read as a limitation upon the power expressly granted in Section 201(b).

terpreted the pre-1935 decisions of this Court, which precipitated passage of both the Natural Gas Act and Parts II and III of the Federal Power Act as holding that only a multi-state interest in the particular activity being regulated (here, the rate for a sale at wholesale) would inhibit the State in which the sale takes place from exercising authority over it.

It is far too late, however, to define the Commission's jurisdiction over sales at wholesale in interstate commerce on the basis of a restrictive reading of this Court's decisions in *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83, and related cases. Without doubt, the primary purpose of Congress in giving the Commission jurisdiction over the sale of interstate power at wholesale was to close the "*Attleboro* gap." See *infra*, pp. 16–18. But Congress was not content merely to proclaim that objective in general terms and then leave to the courts the task of determining the limits of the States' constitutional authority. As the statute attests, it did more. In Section 201(b) Congress itself explicitly defined the scope of the regulatory "gap" it wished to bridge. It made the legislative judgment that, so far as sales at wholesale in interstate commerce were concerned, it *was* in the national interest for the federal commission to act. That determination was left neither to the vagaries of time nor to the fortuities of litigation; it was laid to rest by an affirmative grant of regulatory authority.

B. THE LEGISLATIVE HISTORY OF THE POWER ACT NEGATES ANY LIMITATION ON THE PLENARY GRANT OF JURISDICTION TO THE COMMISSION

The legislative history of Part II of the Federal Power Act shows that in legislating to fill the *Attleboro* "gap" Congress regarded all interstate sales at wholesale of electric energy as beyond the reach of the States under the prior decisions of this Court. Thus, the report of the Senate Commerce Committee declares [S. Rep. No. 621, 74th Cong., 1st Sess., pp. 17 47]:

> * * * The decision of the Supreme Court in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U.S. 83) placed *the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States* * * *. [Emphasis added.]
>
> * * * * *
>
> Subsection (b) defines the scope of this part of the act and the jurisdiction of the Commission. Its provisions apply to the transmission of electric energy in interstate commerce, the sale of energy at wholesale in interstate commerce * * *. They do not apply to the retail sale of any energy in local distribution. This subsection leaves to the States the authority to fix local rates even in cases where the energy is brought in from another State. In *Pennsylvania Gas Co.* v. *Public Service Commission* (252 U.S. 23), the Supreme Court held that such rates may be regulated by the States in the absence of Federal legislation. The present bill carefully refrains from asserting Federal jurisdiction over these rates. The rate-making

> powers of the Commission are confined to those wholesale transactions which the Supreme Court held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (273 U.S. 83), to be beyond the reach of the States. * * *

Similarly, the report of the House Commerce Committee states [H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7–8]:

> * * * Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U.S. 83), *the rates charged in interstate wholesale transactions may not be regulated by the States.* Part II gives the Federal Power Commission jurisdiction to regulate these rates. * * * [Emphasis added.]

The hearings before both the House and Senate committees are replete with statements expressing a general understanding that under the *Attleboro* decision and prior related cases, the States had no jurisdiction over any wholesale transaction in interstate commerce. See, *e.g.*, Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess. at pp. 96, 384, 402, 421–422, 435, 497–498, 518, 521–523, 1612, 1614, 1622–1623, 1629, 1639, 1642, 1656–1657, 1679, 2143, 2144, 2156; Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., at pp. 250–251, 760, 767–768, 800–801; see also 79 Cong. Rec. 10784, 10790. Of particular interest are the statements of Mr. John E. Benton, general solicitor of the National Association of Railroad and Utilities Commissioners ("NARUC"), who, while generally favor-

ing the proposed legislation, presented a series of amendments, including the declaration of intention eventually adopted as Section 201(a) of the Act, to prevent encroachment upon the existing regulatory authority of the States. In discussing the *Attleboro* case, he explained that [Hearings on H.R. 5423, *op. cit., supra*, at p. 1657]:

> That case has been accepted by everybody as establishing the distinction between wholesale and retail business and as establishing the fact that the State cannot regulate wholesale transactions, although it can regulate retail service and rate. * * *

Again, during the Senate hearings, he stated [Hearings on S. 1725, *op. cit., supra*, at p. 760]:

> While the State commissions favor Federal regulation of the wholesale transactions of electric utilities, they urge that the legislation should go no further than is necessary to protect the public interest in this field which is beyond the reach of State regulation.
>
> The amendments which we have presented to title II accordingly are designed to limit the jurisdiction to be conferred by Congress upon the regulating Federal commission to the regulation of wholesale transactions where electric energy is purchased at wholesale for ultimate resale to the consuming public.

Significantly, one of the amendments presented by Mr. Benton on behalf of NARUC would have specified that the only sales covered by the Act would be sales "at wholesale." When originally introduced, S. 1725

did not make this clear, providing (in § 201(a)[10]) only that:

> The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, but shall not apply to the retail sale of energy in local distribution. * * *[11]

This sentence, under the proposed NARUC amendment, would have read:

> The provisions of this title shall apply only to the transmission and sale at wholesale of electric energy in interstate commerce and to the production of energy for such transmission and sale. They shall not apply where electric energy is sold for use within the State in which it is generated or in local distribution. * * *

Hearings on S. 1725, *op. cit., supra,* at p. 748; Hearings on H.R. 5423, *op. cit., supra,* at p. 1660. The substance of the proposal—*i.e.,* to add the words "at wholesale" in order to provide a clear delineation of state and federal jurisdiction—was, of course, adopted by the Congress.

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[10] This became § 201(b) after the declaration of intention was added as § 201(a).

[11] § 201(a) of H.R. 5423, the original bill in the House similarly made no references to sales at wholesale, providing only: "The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, except where such electric energy is sold for use within the State in which it is generated. * * *"

C. THIS COURT HAS REPEATEDLY RULED THAT THE COMMISSION HAS JURISDICTION OVER ALL SALES OF ELECTRIC ENERGY AND NATURAL GAS AT WHOLESALE IN INTERSTATE COMMERCE

This Court has said time and again that the Federal Power Commission has plenary jurisdiction over all sales at wholesale of electric energy and natural gas in interstate commerce.[12] *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506-508; *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 629-631; *Panhandle*

[12] As the court below recognized, the two Acts, as originally enacted, have been recognized as interchangeable with respect to the Commission's jurisdiction over sales of gas or electric energy in interstate commerce for resale. Compare Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), with Section 201(b) of the Federal Power Act. See, *e.g.*, *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 69; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 472-474; *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (C.A. 7), certiorari denied, 345 U.S. 934. In fact the Natural Gas Act was originally introduced as a proposed Title III to the Public Utility Holding Co. Act of 1935, 49 Stat. 838, of which Parts II and III of the Federal Power Act were Title II. See H.R. 5423, 74th Cong., 1st Sess. as introduced February 6, 1935. The only significant difference is that the Power Act, adds a requirement, not present in the Gas Act, that before a company becomes a "public utility", and hence subject to rate regulation under Sections 205 and 206 of the Act, it must (as Southern California Edison admittedly does here) own facilities for the jurisdictional transmission or sale of electric energy. *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 964 (C.A. 2), certiorari denied, 319 U.S. 741; *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679 (C.A. 9); *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (C.A. 7), certiorari denied, 345 U.S. 934; *Wisconsin* v. *Federal Power Commission*, 301 F. 2d 183, 185, n. 1 (C.A.D.C.), certiorari denied, 345 U.S. 934.

Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507, 514–517; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 418; *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 303–304, 307–308, 311; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682–683.

In the Court's view, "Congress interpreted [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power." *Public Utilities Commission of California, supra*, 345 U.S. at 308. "The line of the statute was * * * clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana, supra*, 332 U.S. at 517.

The attempt of the court below to dismiss these repeated rulings as mere dicta, inapplicable to situations where the first interstate sale is subject to federal control, has no foundation. None of the cases reflects any balancing of national and local interests and in none is there the slightest intimation that the Court's language was of limited applicability. Like the present case, *Illinois Natural, supra*,[13] in

[13] This was the first case, involving either the Natural Gas Act or Parts II and III of the Federal Power Act to reach the Court.

which the broad scope of the Commission's jurisdiction over interstate sales at wholesale was first enunciated, involved wholesale transactions within a State subsequent to a prior interstate wholesale sale plainly subject to federal regulation under the Natural Gas Act (314 U.S. at 502–503). The Illinois Commission had ordered Illinois Natural Gas Company, which purchased gas from Panhandle Eastern Pipe Line Company at various points within the State of Illinois, to extend its pipeline and sell part of that gas at wholesale to Central Illinois Public Service Company, a local distributing company. This Court sustained Illinois Natural's challenge to the jurisdiction of the state commission. The Court pointed out that each of its decisions leading up to the passage of the Natural Gas Act and Parts II and III of the Federal Power Act had adopted one of two approaches in determining the limits of state jurisdiction over sales of natural gas and electric power produced in one State and consumed in another. One test required a case-by-case balancing of national and local interests; the other mechanically upheld state jurisdiction over retail but not antecedent transactions. Concluding that the Illinois commission had exceeded its jurisdiction, the Court found that Congress had written the retail-wholesale distinction into the Natural Gas Act (314 U.S. at 506–507):[14]

[14] The court below relied (R. 948) upon the following language in the *Illinois Natural* decision:

> "In any case, the proposed extension of appellant's facilities is so intimately associated with the commerce, and would so affect its volume moving into the state and distribution among the states, as to be within the Congressional

In the absence of any controlling act of Congress, we should now be faced with the question whether the interest of the state in the present regulation of the sale and distribution of gas transported into the state, balanced against the effect of such control on the commerce in its national aspect, is a more reliable touchstone for ascertaining state power than the mechanical distinctions on which appellee relies. But we are under no necessity of making that choice here, for Congress, by the Natural Gas Act, has brought under national control the very matters which the state has undertaken to regulate by the order.

An avowed purpose of the Natural Gas Act of June 21, 1938, was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court

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power to regulate those matters which materially affect interstate commerce, as well as the commerce itself." [314 U.S. at 509]

That sentence, however, was immediately preceded by the following statement:

"In determining the scope of the federal power over the proposed extension of facilities and sale of gas, it is unnecessary to scrutinize with meticulous care the physical characteristics of appellant's business, in order to ascertain whether, as the court below held, the interstate commerce involved in bringing the gas into the state ends before delivery to distributors." [p. 509]

Both sentences, it is clear, went to a question which is not at issue here—*i.e.*, whether the sales involved were within the constitutional power of Congress under the Commerce Clause. In the present case, the Commission found and the court below assumed that the sale to Colton was "in interstate commerce."

> had declared to be interstate commerce not subject to certain types of state regulation. H. Rep. No. 709, Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., April 28, 1937. * * * *By its enactment, Congress undertook to regulate a defined class of natural gas distribution, without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases.* [Emphasis added.]

Any possible contention that the *Illinois Natural* holding does not apply to rate matters is conclusively refuted by *Colorado-Wyoming, supra,* a gas rate case involving facts closely analogous to those in *Illinois Natural* and the present case. The Colorado-Wyoming Company bought out-of-state gas at Littleton, Colorado, and then transported and sold it at wholesale to local distributors in Colorado, and, in one instance, Wyoming. The first sale at Littleton was concededly subject to Power Commission regulation. Yet the Commission, without a finding of national or multi-state interest in any of these transactions, held that the sales at wholesale in Colorado, as well as the one in Wyoming, were subject to its jurisdiction. This Court—without placing any reliance upon the single sale in Wyoming—upheld the Commission's jurisdiction on the basis of *Illinois Natural.*

In *Pennsylvania Water & Power Co., supra,* this Court upheld the Power Commission's jurisdiction over Penn Water's rates for sales at wholesale within the State of Pennsylvania, even though the prior

sales for resale to Penn Water in that State were also subject to Commission regulation. Again, neither the Commission nor the Court rested its decision on any finding of multi-state interest in the sales.

In *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, the Court held that the Commission had jurisdiction over a company's transportation operations where all of its facilities were within the State of Ohio and it made only retail sales within the State following its purchase of gas at wholesale at the Ohio boundary.[15]

The opinion below seeks to distinguish *East Ohio*, as well as *Illinois Natural*, on the ground (R. 948) that the Commission was there regulating "matters other than the rates at which power is sold, matters over which the scope of federal authority is broader because of the specific federal interests and statutory provisions involved." However, the structure of the Federal Power Act permits no such distinction. The scope of the Act, and hence of the Commission's jurisdiction, is defined in Section 201(b) as covering "the transmission of electric energy in interstate commerce and * * * the sale of electric energy at wholesale in

[15] The same result was reached by the court below in *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679 (C.A. 9), where a company which had all its facilities in a single State and made only retail sales in that State, was found to be a "public utility" under the Power Act. There, as here, the company had purchased from the United States out-of-state energy generated at Hoover Dam. In neither of these cases was there any finding by the Commission or any statement by the court that the regulation of the transportation of gas or transmission of energy was necessary because of a multi-state conflict of interests.

interstate commerce." Only if a company operates facilities subject to that jurisdiction does it become a "public utility" under Section 201(e); and only if it is a "public utility" does it become subject to specific types of regulation established by later provisions of the Act, *e.g.*, compulsory interconnections (Section 202(b)), securities regulation (Section 204), and rates (Section 205). There is no basis for suggesting that a company which is a "public utility" because of sales at wholesale is thereby subjected only to some, but not all, of the regulatory powers of the Commission. Certainly the *Colorado-Wyoming* and *Penn Water* cases, summarized above, made plain that the rate powers of the Commission are of fundamental importance. Indeed, in *Penn Water*, this Court declared (343 U.S. at 418) that a "major purpose of the whole Act is to protect power consumers against excessive prices. * * * Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which must be accomplished by the Federal Government."

We note, finally, that in *Wisconsin v. Federal Power Commission*, 201 F. 2d 183, certiorari denied, 345 U.S. 934, the Court of Appeals for the District of Columbia Circuit found Commission jurisdiction in a case virtually indistinguishable from the present one. There, the Wisconsin Power and Light Company purchased energy generated in Illinois at the state boundary and transmitted it to the city limits of four municipalities where it sold and delivered to them for retail [illegible] distribution. The Commission

found that these wholesale sales were subject to its jurisdiction. On review, Wisconsin Power contended (as do respondents) that the Commission's jurisdiction did not attach to the second sales at wholesale because there was no finding that the sales were "national in character." The court of appeals, in affirming the Commission, held that no such findings was necessary, since, under Part II of the Power Act, "the controlling distinction is between wholesale and retail sales" (citing earlier decisions of this Court, 201 F. 2d at 185, n. 1).

D. THE POLICY DECLARATION IN SECTION 201(a) WAS NOT INTENDED TO LIMIT THE JURISDICTION CONFERRED BY SECTION 201(b).

In construing the general declaration of policy in Section 201(a) as a restriction upon the jurisdiction expressly conferred by Section 201(b), the court below wholly misconceived the function of that "preamble." This Court has explicitly declared that while the declaration of policy would be relevant "in resolving any ambiguity or indefiniteness in the specific provisions" of the Act, it "cannot nullify a clear and specific grant of jurisdiction," *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 527, and (with reference to the very problem presented here) that "[t]o conceive of it now as a bench mark of the Commission's power, or an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support." *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 311.

Although it is plain that Congress wished to limit the Commission's jurisdiction to matters lying outside the power of the States, it did not rely solely or even primarily upon the broad language of the policy declaration to accomplish that purpose. Instead, recognizing that a general preamble would not be proof against specific grants of jurisdiction elsewhere in the Act, Congress took pains to insert at each relevant point in the statute those limitations which it deemed necessary to establish the desired boundary line between state and federal authority. The Senate Report submitted by Senator Wheeler (S. Rep. No. 621, 74th Cong., 1st Sess., p. 18) states:

> * * * The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. *The limitation* on the Federal Power Commission's jurisdiction *in this regard has been inserted in each section* in an effort to prevent the expansion of Federal authority over State matters. * * * [Emphasis added.]

The testimony in the hearings before both House and Senate committees showed the same understandings, *i.e.*, that the declaration of intention enacted as part of Section 201(a), or the provision that "[n]othing in this title shall impair or diminish the powers of any state commission" which was Section 217 of the Bills introduced on February 6, 1935 (S. 1725, 74th Cong., 1st Sess.; H.R. 5423, 74th Cong., 1st Sess.), would not be operative against specific grants of jurisdiction in the same Act. Thus, John E. Benton, who

proposed, on behalf of NARUC, a group of amendments designed to preserve existing state authority (see Hearings on S. 1725, *op. cit. supra*, pp. 748–755; Hearings on H.R. 5423, *op. cit. supra*, pp. 1660–1667), testified that a general declaration of intent would not be adequate for that purpose. See Hearings on S. 1725, *op. cit. supra*, 760–761, 785; Hearings on H.R. 5423, *op. cit. supra*, pp. 1624, 1677–1678. Specifically, after citing the *Shreveport* case (*Houston, East and West Texas Ry.* v. *United States*, 234 U.S. 342) as an instance in which a declaration apparently preserving state jurisdiction over intrastate rates of railroads had given way to the requirement of non-discriminatory rates, he asserted (Hearings on S. 1725, *op. cit., supra, p.* 760–761):

> * * * The State commissions do not wish to repeat that experience in the utility field. Accordingly, they have sought in the amendments offered to title II of this bill to separate the field within which the Federal regulatory commission may exercise jurisdiction from that which is reserved to the States, and to make that separation so clear and explicit throughout the bill that there may be no opportunity for judicial construction to make the legislative purposes miscarry.

One of these amendments, as we have seen (*supra*, pp. 18–19), was the specification in Section 201(b) that the Act would apply only to sales *at wholesale*.[19]

[19] The other amendments adopted at Mr. Benton's suggestion are found in the substantive provisions of Part II (including Section 205, relating to rates) specifically tying the Commission's powers thereunder to any transmission or sale "subject

In sum, it is clear that the policy declaration in Section 201(a) was not designed to serve as an independently operative savings clause, restricting the jurisdiction conferred by other provisions, but was intended merely to state in broad terms the basic policy to be implemented by the specific limitations inscribed elsewhere in the Act.

II

THE DECISION BELOW PRESCRIBES AN UNCERTAIN AND UNWORKABLE BASIS FOR DETERMINING THE JURISDICTION OF THE FEDERAL POWER COMMISSION

A. As argued above, Congress purposefully adopted a "rule of thumb"—one which makes all wholesale sales of electric energy in interstate commerce subject to federal jurisdiction and imposes no requirement of proving the quality or the magnitude of the effect upon interstate interests. If we are correct in this—as many prior decisions of this Court indicate—there is no need to go further. Nonetheless, we believe it worth pointing out additionally that the alternative tests—both that suggested by the decision below and that urged by respondents (who have placed a gloss upon that decision)—would prove troublesome in application and tend to impair effective regulation.

The court of appeals has said that the jurisdictional issue turns upon whether "the original sale for interstate transmission is under federal control and no other state is affected in any way by regulation of the subsequent transaction" (R. 951). How does one

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to the jurisdiction of the Commission." It is only in Section 201(b) that the "jurisdiction of the Commission" is defined and conferred.

prove that another State is affected? If this were a case under the Sherman Act, a mere recital of the facts which were assumed in this case would surely suffice. No court would question that a continuous stream of energy (or of goods) moving from an out-of-state supplier to an in-state wholesaler and thence to an in-state distributor would be a matter of interstate concern. Indeed, if there were a restraint at the retail (no less the wholesale) level, the courts would presume that, no matter how local the squeeze, interstate commerce would feel the pinch. *United States* v. *Women's Sportswear Association*, 336 U.S. 460, 464. If the restraint were price-fixing, one would also assume injury to interstate commerce, without any proof of the economic processes by which that injury took its toll, without a demonstration of what the prices would have been but for the price-fixing, and without any evidence as to the magnitude of the harm. In the Sherman Act context, the courts have fashioned these rules out of an awareness of the fact that the existence of the economic relationships is sufficient to establish federal concern and with a lively appreciation of the burdens which would be imposed if one were required in all instances to make a full evidentiary showing as to the mechanics by which interstate interests are affected and how much.

In the situation posed by the case at bar, there is, we submit, even less reason for requiring such an evidentiary showing, for here the standard fixed by Congress is more specific than it is under statutes which make federal jurisdiction depend upon a showing of conduct injuring or adversely affecting com-

merce among the several States. The mere fact that a designated transaction is "in interstate commerce" satisfies the language of Section 201(b) without more. Here, the court of appeals assumed that there was a sale of electric energy at wholesale in interstate commerce, yet required that something more be proved. We point out in this section of the brief that the problems created by the requirement of proving this "something more" would be vexing and burdensome, would inevitably inspire protracted litigation and varying judicial interpretations, and would operate to the detriment of effective regulation.

B. To appreciate the practical difficulties inherent in the court of appeals' approach, it is useful to consider some of the numerous ways in which a second wholesale transaction in interstate commerce, though it takes place entirely within the State of consumption, may nonetheless be a subject of federal concern. Whether the electric energy emanates from a single out-of-state source or is generated by an integrated power pool consisting of many sources, the rate level at which the "in-state" sale is fixed may have a significant effect upon out-of-state consumers.

This effect is particularly evident in a case where the in-state seller also makes sales of electric energy to customers in other States. If the rate for the in-state sale is excessive, there may be a contraction in the demand for the seller's power among in-state distributors and therefore an increase in the proportion of the seller's system-wide fixed costs which must be borne by the out-of-state customers under rates subject

to Power Commission jurisdiction.[17] An unwarranted burden may also fall upon the out-of-state customer if the rate for the in-state wholesale is fixed at a level so low that it fails to defray an appropriate share of the seller's over-all system-wide costs. Compare the Interstate Commerce Act, 24 Stat. 383, as amended, Section 13(4), 49 U.S.C. 13(4). For in that case the seller must either recover a disproportionate share of those costs from its out-of-state customers or operate on an unprofitable basis, with resultant deterioration of the quality and efficiency of its service. The same consequences would be felt by the out-of-state customers if the wholesaler did not export energy to them directly, but instead sold it to an intermediary company within the same State for resale across state lines. And, indeed, there are indications that Edison may have made sales of that type during the period involved in this case.[18]

[17] Put differently, the reduced volume of sales within the State would increase the seller's over-all unit costs, which in turn are the measure of the rates it would be permitted to charge out-of-state customers. Unless the in-state transaction were subject to Federal Power Commission jurisdiction, the fact that the seller may have collected rates *in excess* of unit costs on its in-state wholesale sales would probably not go to reduce the rates allowed it on the jurisdictional sales across state lines, since the Commission does not as a rule take into account the profits or losses realized by a company on its non-jurisdictional business.

[18] While the court below "found" that Edison made no out-of-state sales (a fact not inquired into by the Commission), it did not find that Edison made no sales to companies making out-of-state sales.

In this connection it may be noted that the Edison Company is now interconnected and has made deliveries of energy to California Electric Power Company (see Southern Cali-

Moreover, even where all the electric energy sold by the wholesaler is consumed within the same State the level of the wholesale rate may still have a significant interstate impact. For an increase in that rate, if it resulted in a curtailment of the demand for the seller's energy among local distribution companies, would reduce the amount imported by the seller from its out-of-state supplier. With its load thus reduced, the out-of-state supplier would sustain an increase in its own unit cost and would be forced to pass on that increase to its customers, including those in States other than the wholesaler's State.

It is evident from this analysis that the application of the standard prescribed by the decision below would raise factual and legal issues of great complexity. If, for example, the Commission's jurisdiction depends upon whether the seller is making out-of-state sales, how many such sales suffice? Does

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fornia Edison Co. Power System Statements for 1958, 1959, 1960, 1962, F.P.C. Forms No. 12, pp. 18, 18, 18, 19, respectively) which makes federally regulated sales at wholesale for use in Nevada. See *United States* v. *Public Utilities Commission of California*, 345 U.S. 295. Recently these two companies filed an application for merger with the Federal Power Commission. See 28 Fed. Reg. 6604 (June 25, 1963). Moreover, in 1961, Edison, California Electric, Pacific Gas and Electric Company and San Diego Gas & Electric Company entered into a power pooling agreement. See Edison Electric Institute, "Report on the Status of Interconnections and Pooling of Electric Utility Systems in the United States", p. 69 (May 1963); see also Southern California Edison Co. Power System Statement for 1962, F.P.C. Form No. 12, p. 27-b. The record also shows that the transmission lines serving Arizona and Nevada from the Government's Colorado River plants are interconnected with those serving California, including Edison's (*e.g.*, R. 725, 731).

federal jurisdiction, once attached, depend upon the continuation of the out-of-state sales? If the seller has no out-of-state customers, may federal jurisdiction be based upon the possible impact of the in-state wholesale rate upon an out-of-state supplier? If so, how great must that impact be and how may it be shown? It is readily apparent why Congress wished to by-pass such questions and to establish a clear and workable boundary line as between the areas of federal and state jurisdiction.

C. Respondent Edison argues that the difficulties of proving that another State is affected may be avoided by reading into the decision below a simple rule, stated as follows (Br. in Opp., pp. 14–15): "once there has been a federally-regulated sale for resale of energy which is to be consumed wholly within one state, subsequent sales of that energy within the state of ultimate consumption involve the interest only of that state." This is to presume, quite contrary to fact, that there is no significant economic effect of "second" sales on "first" sales. It is also to say, quite contrary to the text of Section 201(b), that the Commission's jurisdiction extends only to *some* sales at wholesale in interstate commerce.

We note at this juncture additional consequences which would follow from adoption of the Edison rule of public-utility jurisdiction.

1. Highly specialized and increasingly important questions of regulation arise in cases where the company making the in-state sale is a member of an interstate power pool—an integrated network of power sources tied together by high-voltage transmission

lines reaching across state borders. In such cases the need for federal regulation is especially vital. Section 202(a) of the Act directs the Commission to divide the country into regional districts for voluntary interconnection and coordination of facilities and to "promote and encourage" such cooperation within those districts. Section 202(b) gives the Commission certain powers to "direct a public utility * * * to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the sale of electric energy, to sell energy to or exchange energy with such persons." As early as 1935, the Senate Committee Report on Part II of the Federal Power Act pointed to the fact that "local operating units have been tied together into vast interstate systems." (S. Rep. No. 621, 74th Cong., 1st Sess., p. 17.) Spurred by important technological developments, the trend toward interstate integration which so impressed Congress in 1935 has accelerated dramatically in recent years. Edison Electric Institute, "Report on the Status of Interconnections and Pooling of Electric Utility Systems in the United States" (May 1963); *Electrical World*, Vol. 158, No. 22, pp. 39–42 (Nov. 26, 1962). Today the entire country east of the Rocky Mountains is interconnected, and the Commission's efforts to promote regional interties throughout the nation are fast bearing fruit.

Even the briefest description of an interstate power pool serves to explain why the regulation of the wholesale rate for power emanating therefrom must be a federal responsibility. An integrated power pool is a

complex system of arrangements whereby a group of companies located in several States interconnect their facilities and coordinate their planning and operations in an effort to bring about major economies of scale. Such economies are made possible in a number of ways—*e.g.*, through (a) the interchange of energy on an hour-to-hour and day-to-day basis with a view to maximizing the use of the more efficient units of the system and making optimum use of the special capacities of each; (b) the longer-run interchange of unused generating capacity among companies having diverse seasonal load patterns; (c) the sharing of emergency reserve capacity and consequent reduction in the aggregate amount of reserves required by the group as a whole; and (d) the cooperative scheduling of new installations so as to facilitate the construction of larger or otherwise more efficient generating units. The savings which stem from these and other sources are shared by the participating companies, in some instances on the basis of estimates as to the costs each would have incurred had it acted independently, and in accordance with formulae set forth in their contracts on file with the Federal Power Commission.

In order to determine the legitimate costs of any member company, and thus the just and reasonable rate for the power sold by that company to wholesale customers in its own and other States, a regulatory agency must be able to ascertain both the total economies realized by the group as a whole and the proper allocation of those economies among the member companies. That formidable task can be accomplished

only by an agency which has a highly specialized staff and, even more indispensable, the legal authority to compel production of the books and records of all members of the system, not merely the particular member whose rates are at issue. It is perfectly clear that a state commission, lacking this essential legal authority, cannot effectively assure that local distribution companies (and hence the ultimate consumers) within the State receive their fair share of the cost savings made possible by advancing technology and interstate integration.

Nor is it an adequate answer to say that the state commission which fixes the rate for the "second" or in-state sale at wholesale need not undertake its own investigation of the internal arrangements of the pool, but may rely, instead, upon the preliminary cost estimates presumably made by the Power Commission when it passes upon the "first" sale—*i.e.*, the interchanges of power among the members themselves. It is true that the Commission reviews and accepts for filing the pool agreement (and any subsequent amendment thereto) before it goes into effect. But this does not constitute a full determination as to the justness of the arrangement as it has worked out in practice. Moreover, so fluid are the technical operations of the pool that cost determinations, once made by the Commission, may easily become outdated. Accordingly, the agency which regulates a sale at wholesale by a member of the pool to a local distribution company must make a fresh and current appraisal of the costs incurred, and the savings realized, by all the member companies. A state commission is not

equipped to do that. By the same token, the Federal Power Commission alone can determine the cost elements which relate to the two sales and effectively regulate both.

2. Edison's approach would also restrict the Power Commission's authority, under Section 202(b) of the Act, to order members of a pool (or, indeed, any other wholesaler of interstate power) to make interconnections with local distribution companies. If the Commission is held to be without jurisdiction to prescribe the rates for wholesale transactions between a particular seller and a particular distribution company, by parity of reasoning it would also be without power to order the wholesaler to interconnect with and serve the distributor. It cannot be assumed that state commissions operating from a more restricted and parochial vantage point would have the same awareness of the potential benefits of interconnection or the same interest in developing a highly integrated system. Indeed, the striking fact is that at least eighteen state commissions are completely without authority to order interconnection. See F.P.C., *State Commission Jurisdiction and Regulation of Electric and Gas Utilities*, pp. 18–25 (1960).

3. Edison seeks comfort from the fact that in 1954 Congress amended the jurisdictional provisions of the Natural Gas Act to exempt persons receiving natural gas within a State and transmitting or selling it for consumption solely within the same State.[19] The argument, we believe, cuts quite the other way.

[19] The so-called Hinshaw amendment (Section 1(c) of the Natural Gas Act, 68 Stat. 36, 15 U.S.C. 717(c)), states in part

Congress, to be sure, modified the Natural Gas Act along the lines which Edison would adopt (by way of interpretation) for the Power Act. Congress, however, has not seen fit to amend the latter statute, although the Commission has long exercised jurisdiction over second sales of electric energy (*Pennsylvania Water & Power Co.*, 8 F.P.C. 1, affirmed, 193 F. 2d 230 (C.A. D.C.), affirmed, 343 U.S. 414; *Interstate Light and Power Co. (Wisconsin)*, 10 F.P.C. 225, affirmed *sub nom. Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183 (C.A. D.C.) certiorari denied, 345 U.S. 934) and over companies all of whose facilities are located within the State in which the energy is consumed (see *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679 (C.A. 9); *Florida Public Utilities Co.*, 9 F.P.C. 3). A bill which would have similarly limited the Commission's jurisdiction in the electric field was in fact offered. It was vigorously opposed by the Commission at protracted hearings before a House Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 2972 and 2973, 80th Congress, First Session, and died in committee.

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that the provisions of the Natural Gas Act: "* * * shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a state commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Fed-

Finally, we point out that the exemption conferred by the Hinshaw Amendment to the Natural Gas Act was made available to a pipeline only on condition that the wholesale gas rates and services would be actively regulated by a State commission. Not all States have chosen to regulate the wholesale rates of electric utilities.[20] Thus, Edison's approach, if adopted, would modify the Power Act even in circumstances (*i.e.*, where there is an absence of state regulation) where the Commission would retain jurisdiction under the Natural Gas Act as amended by Congress.

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eral Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction." The amendment was intended to modify the results of this Court's decision in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464.

[20] The Federal Power Commission's booklet, *State Commission Jurisdiction and Regulation of Electric and Gas Utilities*, 18–25 (1960), and the questionnaire upon which it was based, discloses that: Four States—Alaska (where no interstate sales are made), Texas, South Dakota, and Minnesota—have no commission which regulates the rates of electric utilities. In Mississippi, the state commission has no authority to regulate any wholesale rates. In three States—Virginia, Michigan, and Florida—the commission has no jurisdiction over wholesale rates for sales to municipalities (or, in the case of Florida, to cooperatives), although the Michigan commission may regulate such rates if both parties so request.

Iowa amended its public utilities statute on April 19, 1963 (Iowa Code Anno. Leg. Serv. (1963), No. 3, p. 150), and its application to wholesale rates is still a matter of construction. One public utility, however, has expressed the view that the new statute does not cover the sale of electricity at wholesale. *Electrical World*, Vol. 160, No. 5 (July 29, 1963).

In one State, Nebraska, the rates of public power districts are not subject to regulation and the rates of privately owned and municipally owned utilities outside corporate limits may be considered upon application or complaint.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision below should be reversed.

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SEPTEMBER 1963.

APPENDIX

1. The Federal Power Act, Federal Water Power Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791–825r, as amended, provides, in pertinent part, as follows:

> SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.
>
> (b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmis-

sion of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 847, 16 U.S.C. 824]

* * * * * * *

SEC. 202. (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in

part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them. [49 Stat. 848; 16 U.S.C. 824a]

* * * * * *

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate

or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate

or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 851; 16 U.S.C. 824d]

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e]

2. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 1

* * * * *

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

(c) [1] The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

[1] Subsection (c) was added March 27, 1954, by Public Law No. 323, 83d Congress, chapter 115, 2d session [H.R. 5976] 68 Stat. 36.

SEC. 7.

* * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certifi-

cate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)] [2]

* * * * *

[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H.R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

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